

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no.	152 of 2020
First date of hearing	03.02.2020
Date of decision	13.07.2022

1. Kamal Kishore, S/o Bodhraj 2. Manju Soni, W/o Kamal Kishore Both R/o: H.No. 871, Ward no. 15, Sector 37, Ashok Enclave, Village - Anangpur Dairy, Faridabad, Haryana- 121003	Complainants
Versus	
M/s Spaze Towers Pvt. Ltd. Registered Office: Spazedge, Sector 47, Gurugram-122002	Respondent

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Vidya Sagar (Advocate)	Complainants
Sh. Ishan Dang (Advocate)	Respondent

ORDER

1. The present complaint dated 14.01.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that

the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	"Spaze Tristaar, Sector - 92, Gurugram
2.	Project area	2.718 acres
3.	Nature of the project	Commercial project
4.	DTCP license no. and validity status	72 of 2013 dated 27.07.2013 valid upto 26.07.2017
5.	Name of licensee	Spaze Towers Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide no. 247 of 2017 dated 26.09.2017
7.	Unit no.	1087, first floor (Page no. 21 of the complaint)
8.	Unit area admeasuring	228 sq. ft. (Page no. 21 of the complaint)

9.	Allotment letter	23.09.2014 (Page no. 30 of the reply)
10.	Date of buyer agreement	20.10.2014 (Page no. 17 of the complaint)
11.	Possession clause	<p>11(a) Schedule for possession of the said unit</p> <p>The developer based on its present plans and estimates and subject to all just exceptions endeavors to complete construction of the said building / said unit within a period of sixty months from the date of this agreement unless there shall be delay or failure due to department delay or due to any circumstances beyond the power and control of the developer or force majeure conditions including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the allottee(s) to pay in time the total consideration and other charges and dues/payments mentioned in this agreement or any failure on the part of the allottee(s) to abide by all or any of the terms and conditions of this agreement. In case there is any delay on the part of the allottee(s) in making of payments to the developer then notwithstanding rights available to the developer elsewhere in this agreement, the</p>

period for implementation of the project shall also be extended by a span of time equivalent to each delay on the part of the allottee(s) in remitting payment(s) to the developer..... **(Emphasis supplied)**

(Page 39 of the complaint)

Though the possession clause is given in the buyer agreement, but the time period is not mentioned w.r.t. to due date. Therefore, the due date is calculated from 60 months from the date of this agreement, which is mentioned in clause 1.2 of buyer agreement. The relevant clause is reproduced under:

Escalation charges shall be computed at the expiry of sixty months from the date of this agreement or at the time of offer of possession (permissive or otherwise) whichever is earlier. The RBI indexes for the month of execution of this agreement and for the month at the expiry of 60 months from the date of this agreement /month of offer of possession (permissive or otherwise), whichever is earlier, shall be taken as the opening and closing indexes respectively to compute the escalation charges. (Page 27 of complaint)

12.	Due date of possession	20.10.2019
13.	Total sale consideration	Rs.21,39,552 /- (Page no. 30 of the reply)
14.	Amount paid by the complainants	Rs. 15,54,532/- (Page 3 of the complaint and at page 10 of reply)
15.	Occupation certificate /Completion certificate	Copy of OC dated 03.05.2021 supplied during proceedings
16.	Offer of possession	Not offered
17.	Delay in handing over the possession till date of filing complaint	2 Months and 25 days

B. Facts of the complaint:

- The complainants through an application form dated 14.03.2014 applied for allotment of a unit in the project mentioned above. The complainants, at the time of the booking, were provided with a layout plan of the project from which the customers could choose the unit they wanted according to their budget and choice. Based on that layout plan, they chose unit no. 1087 admeasuring 228 sq. ft by paying a booking amount of Rs. 2,00,000/-. Thereafter, the parties executed a buyer's agreement dated 14.09.2014.
- After signing the agreement, they started making payments against the demands raised by the respondent. In February 2019, the complainants received a fresh demand notice dated 06.02.2019 of Rs. 1,69,803/-. Before making the payment, they wanted to ascertain the progress of

the construction and hence, sought certain information from the promoters. On 09.03.2019, they received a layout which was different from the original layout. On seeing the new layout, they visited the construction site. To their surprise, the enclosure type structure which was coming at the site of original unit no. 1087 was visibly much smaller than the original size.

5. The complainants took up this issue to the promoter vide letters dated 12.03.2019, 20.03.2019 and 16.04.2019. The respondent-promoter, on 08.07.2019, finally sent a draft letter for complainant's signatures for giving consent for relocating unit no. 1087. It is pertinent to mention that the complainants have yet not given its consent for the same as the price of the new unit offered was not indicated and the language of the form suggested that it was the complainants who were applying for swapping of the unit.
6. The respondent had again issued demand letter dated 06.12.2019 from which it becomes clear that the tentative size and price of the unit has been changed. The complainants then again wrote to the respondent regarding the issue to which there was no reply from respondent's end.
7. That the entire problem arose because of unilateral change of unit's size by the respondent. The complainants thus aggrieved by that behaviour of the respondent wanted to withdraw from the project and hence, this case for refund was filed before this Authority.

C. Relief sought by the complainants:

8. The complainants have sought following relief(s):
 - i. Refund the entire amount of Rs. 15,54,532/- so far deposited by the complainants.

- ii. Interest @18% on the above-mentioned amount.
- iii. Compensation of Rs. 10,00,000/- for the damages suffered by the complainants on account of illegal acts or omissions of the promoters.

D. Reply by respondent:

The respondent by way of written reply dated made the following submissions:

9. The respondent has based its reply on the fact that complainants have no locus standi or cause of action to file the present complaint and the same is not maintainable in law or on facts and the same is barred by limitation.
10. The complainants are not an "aggrieved party" or "allottee" as defined under the Act. The complainants are investors who have purchased the unit in question as an investment.
11. The application for booking dated 20.10.2014 was voluntarily and consciously executed by the complainants after reading and understanding the contents thereof. That after signing of the application form, the complainants were allotted unit in the given project vide letter dated 23.09.2014. It was further clarified that no agreement dated 14.09.2014 exists between the parties. The Buyer's Agreement was in fact executed on 20.10.2014.
12. It was not denied that in clause 1.2 of Buyer's Agreement dated 20.10.2014, the respondent stated that it would endeavour to complete

the construction of the project within a period of 60 months from the date of execution of the Builder Buyer Agreement. However, due to certain orders passed by NGT banning construction in the NCR region, shortage of labour, construction material, demonetisation, delay in making payments by various allottees, Covid 19, farmers protest, implementation of social schemes and increase in demand of labour, the construction of the project was struck of affecting the pace of construction activities which led to a delay of a period of 227 days. Furthermore, the complainants have, been irregular in payment of instalments from the very beginning and consequently the respondent had levied interest on delayed payments, in accordance with the Buyer's Agreement.

13. It was further submitted that the size of the unit was not unilaterally changed by the respondent. The complainants were fully aware and had unconditionally agreed that the building plans were tentative in nature by assenting to buyer's agreement wherein clause 1.6 specified that alteration, changes and modifications can be made to the said unit.
14. Vide letter dated 08.07.2019, the respondent had offered to reallocate the complainants to unit bearing no. 1090 located on 1st floor admeasuring 205 sq. ft. from the unit provisionally allotted to them after oral discussions with the complainants. During those oral discussion, the pricing details was also mentioned to the complainants.

The complainants, though had orally agreed to the reallocation, has not signed any written agreement for the same.

15. The demand letter issued on 06.12.2019 has specified the unit details and pricing as was in the buyer's agreement and thus, the complainant's contention is denied.
16. The completion date as specified in RERA registration certificate is 30.06.2020 and the respondent is committed to completion of the project and deliver the unit in question to the complainants by that time. Thus, the institution of the present complaint is highly premature and misconceived and the same is liable to be dismissed at the very threshold. All other averments made in the complaint were denied in toto.
17. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

18. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has completed territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.1 Objection regarding force majeure conditions:

21. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as NGT banning construction in the NCR region, shortage of labour and construction material, demonetisation, delay in making payments by various allottees, Covid 19, farmers protest, implementation of social schemes and increase in demand of labour but the same is devoid of merit. The unit buyer's agreement was executed between the parties on 20.10.2014 and the events taking place such as holding of commonwealth games, dispute with the contractor, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F.2 Objections regarding the complainants being investor:

22. It is pleaded on behalf of respondent that complainants are investor and not consumer. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act,

states that the Act is enacted to protect the interest of consumer of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the space buyer's agreement, it is revealed that the complainants paid total amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

23. In view of above-mentioned definition of allottee as well as the terms and conditions of the space buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit allotted to him by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and

'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as **M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

G. Entitlement of the complainants for refund:

G.1 Direct the respondent to refund of amount of Rs. 15,54,532/- paid along with interest @ 18% p.a.

24. The complainants were allotted the subject unit by the respondent for a total sale consideration of Rs.21,39,552 /- against payment of Rs.2,00,000/- as booking amount. A buyer's agreement dated 20.10.2014 was executed between the parties with regard to that unit. The due date of possession of the subject unit was calculated as per clause 11(a) where the **complete construction of the said building / said unit was to be done within a period of sixty months from the date of this agreement.** Since the BBA is silent in possession clause w.r.t. due date of possession so we have calculated the due date of possession from escalation charges which comes out to be 20.10.2019. The allottees-complainants made a payment of Rs. 15,54,532/- which is 72.65% of total consideration. The due date of possession was 20.10.2019 which date has already expired. Neither the project is complete, nor the respondent applied for its occupation certificate up to the date of filing of the complaint i.e., 14.01.2020.

Even now, the project is not ready, and its occupation certificate has not been applied.

25. So, keeping in view the fact that the allottee/ complainants wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein, the matter is covered under section 18(1) of the Act of 2016.
26. The due date of possession is 20.10.2019 as mentioned in the table above and there is delay of 2 months and 25 days on the date of filing the complaint. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

“” The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”

27. Further in the judgement of the Hon'ble Supreme Court of India in the cases of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)* reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022* and observed that:

"25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed"

28. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees as they wish to withdraw from the project, without prejudice to any other remedy

available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

29. This is without prejudice to any other remedy available to the allottees including compensation for which they may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
30. The authority hereby directs the promoter to return the amount received by him i.e., **Rs. 15,54,532/-** with interest at the rate of 9.70% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.2 Legal expenses:

31. The complainants are claiming compensation under the present relief. The Authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee(s) can claim. For claiming compensation under sections 12,14,18 and Section 19 of the Act, the complainants may file a separate complaint before the adjudicating officer under Section 31 read with Section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

32. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of


obligations cast upon the promoters as per the functions entrusted to the Authority under section 34(f) of the Act of 2016:

- i) The respondent /promoter is directed to refund the amount i.e., Rs. 15,54,532/- received by it from the complainants along with interest at the rate of 9.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till actual date of refund of the deposited amount.
- ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

33. Complaint stands disposed of.

34. File be consigned to the Registry.

v.1-3
(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.07.2022

